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No. 82-1964

IN THE

Supreme Court of the United States

October Term, 1982

BENNY CONIGLIO,

Petitioner,

-vs.-

WARDEN, CLINTON CORRECTIONAL FACILITY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner submits this brief in reply to the arguments raised in Respondent's brief.

ARGUMENT

POINT

THE BRIEF OF THE RESPONDENT IMPROPERLY RELIES UPON AN ADMISSION SPECIFICALLY EXCLUDED FROM CONSIDERATION BY THE SECOND CIRCUIT COURT OF APPEALS.

In its decision, the Second Circuit Court of Appeals specifically assumed arguendo that the admission made to Sanzo was not to be considered by the jury (3a).*

This decision by the Second Circuit to not consider the admission was not done to aid petitioner, rather it was done to avoid the necessity of deciding whether the prosecution's use of that statement denied petitioner due process.

In this case, during the prosecutor's summation at trial, he repudiated as untrue a statement of Coniglio that he had shot someone in front of a bar in New York. This repudiation was not done out of a desire to aid Coniglio but, rather was an effort to harmonize the prosecution's own proof. The most important witness, John Greco, testified that of the two men in the car he saw, the driver was the shorter (T424-25).** Thus, in order to avoid a conflict in its own evidence (i.e. that

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*References to petitioner's appendix are designated "a".

**References to the transcript of trial are designated "T".

the passenger was the shooter* and that the driver was the shorter man, Coniglio), the prosecutor repudiated Coniglio's statement.

In its brief to the Appellate Division, respondent, in answering Coniglio's sufficiency argument:

> The cold fact is that appellant *murdered* Tommy Genco *just as he described the incident to Nanette Sanzo* . . .
>
> District Attorney's Brief to the Appellate Division, p. 24 (emphasis added)

It is clear that on appeal to the Appellate Division respondent changed its factual theory and argued that Coniglio shot Genco** and that his admission to Sanzo was resurrected.

Petitioner argued in the Second Circuit that this change in theory was improper and denied due process. Evidently, it was to avoid deciding this issue that the Second Circuit did not rely on the admission. In light of the Second Circuit's failure to rule on the propriety of the use of the admission, it is improper for the respondent to now rely upon it. Accordingly, this Court should decide the petition upon the same basis as the Second Circuit.

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*This was determined from the bullet track and the angle of Genco's wound (1475).

**Sanzo testified that "he had shot someone in the head . . ." (196). Thus, when the prosecution argued that Coniglio murdered Genco *just* as he described the incident to Sanzo, it was arguing that Coniglio was the shooter.

CONCLUSION

THE WRIT SHOULD BE GRANTED.

Respectfully submitted,

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